STATE OF MICHIGAN

COURT OF APPEALS

EBONY WHITE, Conservator for MA'KIERAN MOSS, Minor,

Plaintiff-Appellee,

v

HUTZEL WOMEN'S HOSPITAL, a/k/a HARPER-HUTZEL HOSPITAL,

Defendant-Appellant,

and

SUSAN BERMAN, M.D., NICOLE MAHONEY, M.D., and SHUKRI ABDULLAH, M.D.,

Defendants.

UNPUBLISHED
September 25, 2014

No. 304221
Wayne Circuit Court
LC No. 08-106604-NH

Before: MARKEY, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff Ebony White, on behalf of her son, Ma'Kiernan Moss, filed a negligence action against defendants Hutzel Women's Hospital, Dr. Susan Berman, Dr. Nicole Mahoney, and Dr. Shukri Abdullah,[1] alleging that their failure to timely deliver Ma'Kiernan by caesarian section proximately caused the child's cerebral palsy. The jury returned a verdict in favor of plaintiff, and defendant has appealed as of right. We reverse and remand for a new trial.

Plaintiff gave birth to Ma'Kiernan by caesarian section at approximately 5:00 p.m. Following his birth, the child required resuscitation and had to remain in the hospital on bypass. He was subsequently diagnosed with cerebral palsy. At trial, plaintiff's theory was that Dr. Berman breached the standard of care by failing to deliver the child by caesarian section around 2:00 p.m. due to non-reassuring fetal heart tones that appeared on the fetal monitoring strips. Plaintiff asserted that the failure to deliver the child by 2:00 p.m. caused him to have a hypoxic-

[1] Berman, Mahoney, and Abdullah have all been dismissed from the case.

ischemic event, which in turn led to asphyxia at delivery and resulted in the child's cerebral palsy. Defendant's theory was that the child's injuries were actually caused before delivery and were attributable to White's lack of prenatal care, marijuana usage, and post-term delivery. Following the verdict, defendant filed a motion for a new trial and/or judgment notwithstanding the verdict (JNOV) because plaintiff failed to establish proximate cause and the opinion of plaintiff's sole causation expert, Dr. Ronald Gabriel, was not reliable pursuant to MCL 600.2955 and should have been excluded.

I. STANDARDS OF REVIEW

We review a trial court's denial of a motion for JNOV de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The evidence and all legitimate inferences are reviewed in the light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). A motion for JNOV should only be granted if the evidence fails to establish a claim as a matter of law. *Id*.

In addition, we review a trial court's denial of a motion for a new trial for an abuse of discretion. See *People v Unger (On Remand)*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Likewise, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). However, if the trial court's decision involves a preliminary issue of law where a constitutional provision, statute, or rule of evidence determines admissibility, then it is subject to de novo review. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

Finally, "[t]he determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001).

II. PROXIMATE CAUSE

First, defendant argues that the trial court erred by denying defendant's motion for JNOV because plaintiff failed to present evidence from which the jury could reasonably conclude that a breach of the applicable standard of care by defendant proximately caused the child's cerebral palsy. We disagree.

A plaintiff must prove four elements to establish a prima facie case of medical malpractice:

> (1) The appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. [*Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004).]

The proximate cause element consists of two parts: cause in fact and proximate cause. Cause in fact requires that a plaintiff establish that the claimed injuries would not have occurred

but for the defendant's conduct. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Our Supreme Court has noted:

> The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural, and continuous sequence between an act and an injury, the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance. [*Shinholster v Annapolis Hosp*, 471 Mich 540, 551-552; 685 NW2d 275 (2004), quoting 38 Am Jur, Negligence, § 55, p 703.]

Defendant does not contest that plaintiff produced evidence from which reasonable minds could conclude that defendant's alleged breach of the standard of care by failing to deliver the child earlier by way of a Cesarean section was a "but for" cause of the child's injuries. Defendant contends, however, that the connection between defendant's alleged negligent conduct and the child's injuries is entirely speculative and therefore plaintiff cannot establish that defendant's conduct was the proximate cause of the child's injuries.

Viewed in the light most favorable to plaintiff, evidence was presented that the standard of care required that the child be delivered no later than 2:30 p.m. because the sum of several factors indicated that the child was at risk of lack of oxygen (hypoxia) and blood flow (ischemia).[2] One of the standard of care experts testified that no reassurance would have been able to be achieved after 2:00 p.m. Plaintiff's causation expert testified that the child's injuries occurred within the last hour of labor, sometime after 3:59 p.m., and that hypoxia caused the child to experience asphyxia at birth, which led to the child's cerebral palsy. Although defendant presented expert testimony offering a different explanation for the child's injuries, this testimony did not render plaintiff's evidence speculative. Because reasonable minds could differ regarding whether defendant's failure to perform a C-section resulted in the child enduring a prolonged labor during which the child experienced hypoxia that ultimately caused the child's injuries, the issue of proximate cause was properly left to the jury for a determination.

III. RELIABILITY OF EXPERT TESTIMONY

Defendant also argues that it was entitled to a JNOV because the testimony of plaintiff's sole causation expert, Dr. Gabriel, should not have been admitted under MRE 702 and MCL 600.2955 because it was unreliable.

A trial court may permit a person to testify as an "expert by knowledge, skill, experience, training, or education" when the "court determines that scientific, technical, or other specialized knowledge will assist the trier or fact to understand the evidence or to determine a fact in issue." MRE 702. However, before permitting an expert to testify in the form of an opinion, the trial court must ensure that the expert's proposed testimony "is based on sufficient facts or data," "is

[2] The standard of care experts testified that the cause and timing of injury is a matter left to the causation experts.

the product of reliable principles and methods," and that the expert "has applied the principles and methods reliably to the facts of the case." MRE 702. Similarly, under MCL 600.2955, an expert's opinion "is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact." Accordingly, "trial courts must -- at every stage of the litigation -- serve as the gatekeepers who ensure that the expert and his or her proposed testimony meet the threshold requirements." *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012), citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). While the exercise of this gatekeeper function has been committed to the trial court's discretion, "a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Gilbert*, 470 Mich at 780, quoting *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 158–159; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (Scalia, J., concurring).

Here, the trial court did not consider the range of indices of reliability listed in MCL 600.2955. Thus, this Court is unable to determine whether plaintiff succeeded in establishing the reliability of Dr. Gabriel's opinion as to causation. Although plaintiff offered nothing to support the assertion that Gabriel's conclusion resulted from the application of scientifically reliable principles or methods, had the trial court properly considered before trial the factors set forth in MCL 600.2955, plaintiff would have had the burden to establish the admissibility of the expert testimony, which would have required plaintiff to show that the testimony was based on the application of scientifically reliable principles or methods. Indeed, "the trial court acts as the 'gatekeeper" and 'may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets the rule's standard of reliability.'" The trial court determined that Dr. Gabriel's opinion was reliable but failed to fulfill its gatekeeper obligation. Under these circumstances, it would be unjust to penalize plaintiff for the trial court's error and to grant a JNOV for failure to establish that the expert's opinion resulted from the application of scientifically reliable principles. We therefore reverse and remand for a new trial.[3]

IV. OTHER CLAIMS OF ERROR

Because this issue is likely to arise on remand, we will address defendant's argument that the trial court abused its discretion by allowing plaintiff to introduce inadmissible hearsay when the child's mother testified about a statement made to her by Dr. Ascadi at Children's Hospital regarding the cause of the child's injuries.[4] The hearsay evidence went to the heart of the disputed factual issue; that is, whether the child's brain injury was caused by a hypoxic-ischemic event during labor and delivery. This error was not harmless as it was the only evidence that the child's brain injury was caused by such an event. Indeed, plaintiff's counsel focused on this inadmissible hearsay evidence during his closing argument:

> But you know what: Let's not talk about experts on one side or the other.

[3] On remand, defendant is free to raise a challenge to the reliability of Dr. Gabriel's testimony.

[4] Dr. Ascadi did not testify at trial.

> The most important piece of evidence you had in this Record was from a treating doctor. I would submit to you that there's no dog in the fight if you will, no one with an axe to grind, there's nobody who is on one side or the other more than a doctor who is taking Ma'Kieran in after he's born and being tasked with treating him as a pediatric neurologist.
>
> . . . [Dr. Ascadi] explained the problem and conveyed it to the parents, that what happened is exactly what Dr. Gabriel told you happened.
>
> There was a hypoxic ischemic injury that occurred at birth that caused brain damage. That's entirely our case. And the doctor who is not paid by either side, who actually has seen and treated Ma'Kieran, has made that diagnosis.
>
> It's Dr. Ascadi. . . . His statement to the mother and father of Ma'Kieran . . .

Plaintiff's counsel's closing argument demonstrates the significance of this inadmissible hearsay evidence to plaintiff's case, and we conclude that the admission of the hearsay statement, which went to the primary disputed issue at trial, was error warranting a new trial.[5]

Reversed and remanded for a new trial. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald

[5] The remaining issues raised by defendant pertained to this specific trial. Because we have concluded that a new trial is warranted we choose not to address them.